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ALEXANDER L. STEVAS
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NO. 83-1784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PORT HOUSTON MARINE, INC.,
Petitioner

v.

DOCKSIDE TERMINAL SERVICES, INC.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTION PRESENTED

Respondent disagrees with the question presented by petitioner in the Petition for Writ of Certiorari. The only question properly before this court is whether a non-vessel is barred by the Longshoremen's and Harbor Workers' Compensation Act from pursuing a claim for damages caused by a breach of contract against an employer covered by the Act.

LIST OF COMPANIES RELATED TO DOCKSIDE TERMINAL SERVICES, INC.

Dockside Terminal Services, Inc. has no parent or subsidiary companies. Four Cayman Island companies are affiliates: Campeche Steamship Co., Ltd., Vera Cruz Steamship Co., Ltd., Monterrey Steamship Co., Ltd. and Laredo Steamship Co., Ltd. Also, Lone Star Shipping, Inc. is an affiliate.

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OBJECTION TO JURISDICTION

Respondent objects to Petitioner's invocation of this Court's jurisdiction under 28 U.S.C. § 1257(3) and requests that this Court deny jurisdiction of the Petition for Writ of Certiorari. The only basis Petitioner has for jurisdiction is the denial of some federal right. Respondent will show in its discussion of the merits, *infra*, that no federal right has been denied, and that the decision of the Texas Court of Appeals is consistent with federal maritime law.

Prior decisions of this Court have established that its jurisdiction is not that of a general reviewing court in

error when reviewing judgments of state courts. *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86 (1909). All Petitioner is seeking is review of the alleged fact finding errors of the Texas Court of Appeals, which merely reversed the trial court's grant of summary judgment on Respondent's third party action. Respondent respectfully requests that this Court deny jurisdiction of this Petition.

STATEMENT OF THE CASE

Respondent generally agrees with Petitioner's statement of the procedural history of the case but disagrees with the statement of relevant facts. Petitioner has neglected to tell the Court on what grounds the trial court granted summary judgment dismissing Respondent's third party action. While the judgment of the trial court does not mention the grounds, its basis is in the motion for summary judgment and supporting brief in which Petitioner alleged only two things: that there was no evidence of a contract between the parties and that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1972) (hereinafter Longshoremen's Act) was a bar to the third party action. Summary judgment could be granted only on those two grounds. The motion for summary judgment is provided for the Court's review in the appendix to this brief.

The Texas Court of Appeals reversed on both points, holding that there was sufficient evidence of an oral contract between the parties and that the Longshoremen's Act was not a bar to the third party action. The Texas Supreme Court refused the appeal, holding there was no reversible error.

On the matter of essential facts, Captain Eddie Tong testified in his deposition that his job title is General

Manager for Respondent, Dockside Terminal Services, Inc. (hereinafter sometimes referred to as Dockside), but that, on occasion, he would perform some work for the benefit of Lone Star Shipping, Inc. He was not General Manager for both companies at the same time. Also, there is evidence in Captain Tong's deposition and in his affidavit that he advised Petitioner, Port Houston Marine, Inc. (hereinafter sometimes referred to as Port Houston) that Dockside would be providing the shore-side crane.

Finally, Petitioner, in its last paragraph of essential facts states the facts as it would like them to be, not as they truly were decided by the Texas Court of Appeals. Port Houston's petition is really just an attempt to have this Court review the factual sufficiency of the evidence for the third time. There are no compelling legal issues concerning federal matters that need or deserve this Court's attention.

SUMMARY OF REASONS FOR DENYING THE WRIT

Petitioner, in an attempt to have its writ granted, makes the opinion of the Texas Court of Appeals substantially broader than what it actually is. It must be kept in mind that this action is merely a summary judgment granted by the trial court that was overturned by the Texas appellate courts. The decision does not undermine the bedrock of federal maritime law as Petitioner would have this Court believe, but in fact, merely follows sound federal law on the issue of whether a non-vessel may maintain an action against an employer covered by the Longshoremen's Act.

I.

THE DECISION OF THE TEXAS COURT OF APPEALS DOES NOT CONFLICT WITH FEDERAL MARITIME LAW

The decision of the Texas Court of Appeals merely gives Dockside its day in court to prove its third party action against Port Houston. Dockside is not, and has not been, seeking indemnity for its own negligence. Port Houston's fault was itself the cause of Dockside's potential liability to the Plaintiff in the main action. Dockside has contended and the Texas appellate courts have agreed that there is evidence of a contract between Dockside and Port Houston. A provision in the contract implied by industry custom called for Port Houston to provide a flagman to act as the eyes of the crane operator, and Port Houston breached that provision. Port Houston's breach of contract has put Dockside in jeopardy of being held liable to Ralph Barrios, plaintiff in the main action. Dockside has contended through its third party action that if it is held liable to Barrios in tort, it will be because Port Houston breached a contractual duty it had to Dockside.

This is just the type of situation in which justice demands that Port Houston indemnify Dockside and for which the courts have afforded a remedy. *Williams v. Pennsylvania Railroad Co.*, 313 F.2d 203 (2nd Cir. 1963). In *Williams*, plaintiff, an employee of a stevedoring company (Spencer), sued Pennsylvania Railroad Company (Pennsylvania), owner of a hoister. Lehigh Valley Railroad contracted with Spencer to unload a barge owned by Lehigh. Lehigh also contracted with Pennsylvania for Pennsylvania to provide the hoister for

Spencer's use. Pennsylvania filed a third party action against Spencer seeking indemnity. Lehigh was never made a party to the suit. The trial court granted judgment for plaintiff against Pennsylvania on unseaworthiness and negligence grounds and denied Pennsylvania indemnity against Spencer. The Second Circuit Court of Appeals sustained judgment for plaintiff but only on grounds of negligence and reversed the holding that Pennsylvania was not entitled to indemnity against Spencer. The court's discussion of the indemnity issue is directly on point with this case. The court states:

> [W]e think the Pennsylvania [R.R.] would be entitled to indemnification on the basis of an independent contract between Spencer and itself. . . . We see no reason why this contract should not be deemed to include an implied warranty by Spencer to exercise due care in the use of the hoister. . . .
>
> Having found that the Pennsylvania [R.R.] had a contractual right of indemnity from Spencer, we must next consider whether its own conduct was such as to defeat or limit this right. *Recovery by the Pennsylvania on a contract of indemnity is not precluded by the judge's permissible conclusion that Wall's [Pennsylvania's employee] compliance with Alexander's [Spencer's foreman] signal constituted "active negligence", which would bar "common law indemnity"; . . . Spencer's fault was itself the cause of Pennsylvania's fault, which consisted of Wall's obeying Alexander's imprudent signal.*

313 F.2d at 212-13 (emphasis added).

The arguments made in *Williams* are nearly identical to those that Dockside has relied upon throughout this case—that it might be held liable for negligence caused

by the failure of Port Houston to have a flagman direct the operations of the crane. In *Williams*, the court found evidence of an informal contract between the employer and the defendant and implied a contractual right of indemnity, and in fact called it a contract of indemnity. This is precisely what the Texas Court of Appeals has done. Petitioner's arguments concerning prohibition against indemnity for one's own negligence are too broad based and simply do not reach the precise fact issues presented herein.

The heart of Petitioner's complaint is one brief passage in the Texas Court of Appeals decision wherein the court states:

> In this case, however, Dockside did offer evidence of an express oral contract with Port Houston. That contract allegedly included a provision, implied by industry practice, for Port Houston to furnish a flagman. Hence, liability would attach to Port Houston for any damages caused by a breach of that provision. This is evidence of an implied contract of indemnity.

Texas Court of Appeals Decision, p. 3 (opinion supplied in Petitioner's appendix). This is no departure from settled federal maritime law. Petitioner would have this Court believe that there is no such thing as implied contractual indemnity where the indemnitee is found to be a joint tortfeasor. That is not the case, as the *Williams* court held, and as the cases cited by the Texas Court of Appeals also held.

Petitioner misleads this Court when, in its brief, it states that the only cases in which implied contractual indemnity has been granted are where liability of the

indemnitee is based on no-fault concepts such as unseaworthiness and strict products liability. Petition for Writ p. 6. Petitioner states in its brief that the cases cited by the Court of Appeals, *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2nd Cir. 1978) and *Holden v. Placid Oil Co.*, 473 F.Supp. 1097 (E.D. La. 1979), "both involved no-fault liability of the indemnitee; and the indemnitees in those cases were not being sued for negligence." Petition for Writ p. 6-7. That is not true. The third party plaintiff and indemnitee in *Zapico* was held liable for negligence only ("A jury found that defendant and third party plaintiff Bucyrus negligently manufactured the crane. . . .") 579 F.2d at 716. Also, in *Holden*, it was the indemnitor that was being held liable for indemnity based on no-fault principles, not the indemnitees, ("[T]he theory of indemnity is based not on the negligence of the employer [indemnitor], but rather on its position as the manufacturer of an allegedly defective product that injured its employee.") 473 F.Supp. at 1098. The indemnitees in *Holden* were not vessel owners and could be held liable to the plaintiff only for negligence.

Besides the *Williams* case there is substantial precedent authorizing the cause of action Dockside has asserted against Port Houston. *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978); *Holden v. Placid Oil Co.*, 473 F.Supp. 1097 (E.D. La. 1979); and *Gaudet v. J. Ray McDermott and Co.*, 568 F. Supp. 795 (E.D. La. 1983). *Pippen* is closely on point and was relied upon by the Texas Court of Appeals. In *Pippen*, plaintiff was a wireline operator covered by the Longshoremen's Act who was injured on a vessel owned and operated by Inland Well and which was allegedly under lease and/or charter

to Shell. Plaintiff sued Inland Well and Shell for unseaworthiness of the vessel and negligence of both defendants. Both defendants filed third party actions against Superior, plaintiff's employer. The trial court granted Superior summary judgment on both third party actions. The Fifth Circuit Court of Appeals affirmed the grant of summary judgment against Inland Well because it was the owner and operator of the vessel and thus barred by § 905(b) of the Longshoremen's Act from pursuing its third party action. There was no evidence of Shell's relationship to the vessel, so the court refused to bring Shell under the definition of a vessel provided in the Longshoremen's Act. The court, in very clear and concise language, finds that there is no bar to a non-vessel seeking implied contractual indemnity against a covered employer:

> [A] suit for contract-based indemnity (based either on an express or implied contract) would not be barred by § 905(a). In addition, it appears that an action by Shell Oil against Superior Electric based on an express or implied contract of indemnification is also not barred by § 905(b). That section expressly cuts off indemnity only to a "vessel" and makes no specific reference to the right of a third party non-vessel, such as Shell Oil, to bring an indemnity action against the employer.

Pippen, 661 F.2d 386-87 (footnote omitted).

The court goes on to state in a footnote, "Had Congress intended to affect the substantive rights of persons not covered by the LHWCA, it could readily have manifested that intention." 661 F.2d at 387 n.15 [quoting from *Aparicio v. SWAN LAKE*, 643 F.2d 1109, 1116 (5th Cir. 1981)].

Petitioner would read the Longshoremen's Act to provide exclusive liability for the employer as against all parties, vessel and non-vessel, on every type of action, tort, contract and otherwise, which is simply not how the statute is written or how it has been interpreted. The *Pippen* court would have allowed Shell indemnity against the covered employer had there been evidence of a relationship between Shell Oil and plaintiff's employer, even though the only basis for Shell's liability to plaintiff was for negligence. The Texas Court of Appeals was faithfully adhering to precedent set by the federal courts in allowing Dockside to pursue its third party action against Port Houston because there was a finding of evidence of a contractual relationship between the parties on which to base indemnity.

Petitioner relies principally upon the case of *Ocean Drilling and Exploration Co. v. Berry Brothers Oilfield Service, Inc.*, 377 F.2d 511 (5th Cir. 1967) *cert. denied*, 389 U.S. 849 (1967) for the proposition that Dockside may not seek implied contractual indemnity for its own negligence. *ODECO* and its progeny are inapposite. Those cases deal only with the reluctance to extend the *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) warranty of workmanlike performance to the situations covered by those cases. They do not stand for the proposition that a covered employer is immune from liability for breach of contract and/or implied contractual indemnity under the facts and circumstances in the case *sub judice*.

ODECO involved an injury on a stationary offshore platform on the outer continental shelf. The court in that case held that the *Ryan* doctrine did not apply, but stated:

> Thus, while the employer may continue, even in spite of the exclusive liability provision of the [Longshoremen's] Act, to remain liable for indemnity on the basis of an express or implied contractual obligation, *in the absence of such obligation, as here,* there simply exists no underlying tort liability upon which to base a claim for indemnity against the employer.

377 F.2d at 514-15 (emphasis added). The court thus expressly recognizes that implied contractual indemnity is a viable cause of action.

Moreover, the cases Petitioner cites as following *ODECO* all deny *Ryan* indemnity but recognize implied contractual indemnity as a viable action. Each case distinguishes itself on its facts. In *Wellington Transportation Co. v. United States,* 481 F.2d 108 (6th Cir. 1973), a shipowner sued the United States for attorney's fees incurred in a prior suit by a Coast Guardsman against the shipowner. The court found there was no contract between the United States and the shipowner, and thus found that *Ryan* indemnity could not apply.

Hobart v. Sohio Petroleum Co., 445 F.2d 435 (5th Cir. 1971) *cert. denied,* 404 U.S. 942 (1971) is an action by a cargo shipper against a shipowner for attorney's fees incurred in a prior suit by a seaman against the cargo shipper. Under the facts, the court held the *Ryan* doctrine inapplicable.

In *Transcontinental Gas Pipeline Corp. v. Mobil Drilling Barge MR. CHARLIE,* 424 F.2d 684 (5th Cir. 1970), the owner of a pipeline damaged during drilling operations brought suit against the drilling company. The case does not involve a personal injury or the Longshoremen's Act and does not have any application herein.

Schwartz v. Compagnie General Transatlantique, 405 F.2d 270 (2nd Cir. 1968) is a personal injury action by a United States immigration inspector against a shipowner. The shipowner filed a third party action against the United States which was dismissed on summary judgment. The appellate court held that there was no reason to extend *Ryan* to a non-contractual non-service relationship.

Hamilton v. Mesa Petroleum Co., 495 F.Supp. 718 (E.D. La. 1980) presents a set of facts similar to *ODECO* and the court simply follows that decision.

Avondale Shipyards, Inc. v. The Vessel THOMAS E. CUFFE, 434 F.Supp. 920 (E.D. La. 1977) is an action by a shipbuilder against a vessel owner for breach of a construction contract. It does not involve a personal injury or the Longshoremen's Act and thus has no bearing on the suit concerned herein.

Petitioner cites no cases, and Respondent would contend there are none, that hold a non-vessel is not entitled to sue for breach of a contractual agreement between a non-vessel and a covered employer. Petitioner misconstrues the holdings in *Pippen, Zapico* and *Holden*. Those cases do not stand for the proposition that only an indemnitee held liable on a no-fault basis may seek indemnity. They do recognize the equitable principle that liability should be shifted to the party most responsible for causing the accident. They further recognize that Congress did not intend to insulate covered employers from all liability in suits involving non-vessels. Here, if Dockside is forbidden its pursuit of a third party action, it might unjustly be held liable to Ralph Barrios for injury caused by Port Houston, when Port Houston

breached its contractual obligation to Dockside to provide a flagman. Yet Port Houston would have the Court hold it unaccountable to Dockside or anyone else and, in fact, would be reimbursed, dollar for dollar, for compensation payments made to the plaintiff if plaintiff is successful against Dockside. This presents a classic case for implied contractual indemnity.

In summary, the Texas Court of Appeals, in allowing Dockside to maintain its third party action against Port Houston, was properly following precedent set by the federal courts. The *ODECO* line of cases relied upon by Port Houston coexists with this precedent and is not in conflict therewith.

II.

THE DECISION OF THE TEXAS COURT OF APPEALS DOES NOT IN ANY WAY CHANGE THE EXCLUSIVE LIABILITY PROVISIONS OF THE LONGSHOREMEN'S ACT

The law is clear that the Longshoremen's Act is not a bar to a non-vessel's indemnity action against a covered employer. *Pippen*, 616 F.2d at 386-87 and *Zapico*, 579 F.2d at 721-22. The claim that the Act is a bar to Respondent's action, however, was one of the two grounds Petitioner relied upon to obtain summary judgment against Dockside in the trial court (the other ground being no evidence of a contract). The Texas Court of Appeals, following sound federal law, held that the Longshoremen's Act was not a bar to Respondent's action against Petitioner. Accordingly, Petitioner has changed its argument and now claims that the lower court's decision abolishes the exclusive liability provisions of the act

in that the decision resurrects the *Ryan* doctrine. The decision does no such thing; it goes no farther than the decisions relied upon by Respondent herein.

The Texas Court of Appeals relied upon a theory it termed implied contractual indemnity. Respondent has referred to its theory of recovery as breach of contract. Petitioner characterizes Respondent's third party action as one seeking *Ryan* indemnity. Respondent contends that however the theory is denominated, Respondent's third party action should be allowed to stand, as it has not been legislatively or judicially barred.

Take away the gloss from the Petition for Writ of Certiorari and it is apparent that Petitioner's principal argument is that *Ryan*-type indemnity is no longer available to non-vessels. Nowhere in the Petition for Writ of Certiorari does Petitioner argue that implied contractual indemnity or breach of contract actions are foreclosed. Petitioner cannot make the latter argument as the cases upon which it relies expressly allow implied contractual indemnity actions. Moreover, while Respondent does not think it is necessary to apply the *Ryan* doctrine to this case, it would appear that the doctrine is still viable and might well apply in this case. As stated by the Second Circuit Court of Appeals:

> It [legislative history] does indicate that § 905(b) was meant to prevent *Ryan* indemnity actions by vessels, but does not mention suits by non-vessels one way or the other. See H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972), *reproduced in* 3 U.S. Code Cong. & Admin. News pp. 4698, 4701-05 (1972). Neither does A.C.L. [stevedore] necessarily have the better of the legislative policy argument. There is no assurance, as the stevedore claims, that

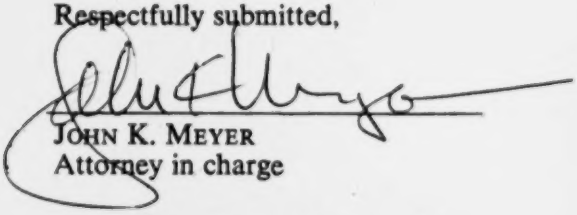
> if Congress had considered non-vessels it would have cut them out as well in order to make compensation payments the sole liability of the employer and to stop triangular suits once and for all. The shipowners got a *quid pro quo* for the loss of their indemnity rights. . . . The 1972 amendments eliminated the unseaworthiness theory and limited vessel liability to negligence in exchange for the surrender of the vessel's indemnity rights (citations omitted). No such *quid pro quo* was offered to non-vessels. Given the clear statutory language and the absence of legislative history at variance with it, we would hesitate to hold that § 905(b) by its own force cuts off the availability of *Ryan* indemnity to a non-vessel in all cases where the concurring negligence of a stevedoring company has caused injuries to the latter's employees, (citations omitted), for example, although we do not intend these to be exclusive, where there is a direct contractual relationship between the third party and the stevedore or where the third party is designated as a beneficiary of an express contract between the stevedore and a vessel.

Zapico, 579 F.2d at 721-22. This reasoning has been followed by other federal and state courts. *Pippen*, 661 F.2d at 387 and n. 15; *Gaudet*, 568 F. Supp. at 798; *Holden*, 473 F. Supp. at 1099-101; *Gould v. General Mills, Inc.*, 411 F. Supp. 1181 (W.D. N.Y. 1976); *Marr Equipment Corp. v. I.T.O. Corp. of New England*, 14 Mass. App. 231, 437 N.E.2d 1076 (1982); and *Gibson v. Seattle/Crescent Container Services*, 28 Wash. App. 508, 624 P.2d 1168 (1981). Therefore, Petitioner has offered no sound, compelling reasons to bar, as a matter of law, Respondent's breach of contract action against Petitioner.

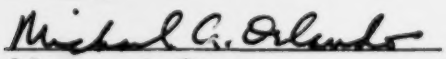
CONCLUSION

This case does not present any novel or unsettled questions of federal maritime law and will have no new and significant adverse effect on covered employers. Respondent, therefore, respectfully requests that the Petition for Writ of Certiorari be dismissed for lack of jurisdiction, or in the alternative, denied on its merits.

Respectfully submitted,



JOHN K. MEYER
Attorney in charge



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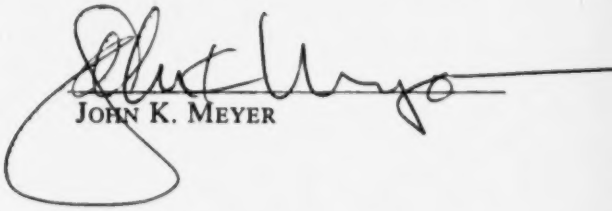
CERTIFICATE OF SERVICE

I, John K. Meyer, hereby certify that on the 24 day of May, 1984, I sent by Federal Express forty (40) copies of this Brief in Opposition to Petition to the Clerk, U. S. Supreme Court; and mailed three (3) copies by certified mail, return receipt requested, to Gray H. Miller, Fulbright & Jaworski, 800 Bank of the Southwest Building, Houston, Texas 77002, attorney for Petitioner.



JOHN K. MEYER

APPENDIX

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Motion for Summary Judgment or, in the Alternative, to Dismiss of Third-Party Defendant Port Houston Marine, Inc.	A-2

NO. 81-19389

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
113TH JUDICIAL DISTRICT

RALPH C. BARRIOS

v.

DOCKSIDE TERMINAL SERVICES, INC.

v.

PORT HOUSTON MARINE, INC.

MOTION FOR SUMMARY JUDGMENT OR,
IN THE ALTERNATIVE, TO DISMISS
OF THIRD-PARTY DEFENDANT
PORT HOUSTON MARINE, INC.

NOW COMES PORT HOUSTON MARINE, INC., Third-Party Defendant in the above-styled action, and pursuant to Rule 166-A of the Texas Rules of Civil Procedure, moves this Honorable Court for a summary judgment in its favor and to dismiss the claim of DOCKSIDE TERMINAL SERVICES, INC., Third-Party Plaintiff, on the ground that there is no genuine issue as to any material fact and movant herein is entitled to a judgment in its favor as a matter of law. In support thereof, movant would show to this Honorable Court the following:

I.

The Plaintiff in the above action, RALPH C. BARRIOS, was at all times material hereto employed by Port Houston Marine, Inc., movant herein, as a ship repairman, and at the time of the alleged injury described in his petition, Plaintiff was in the course and scope of his employment with movant.

II.

Plaintiff, at the time of said alleged injury was entitled to, and has in fact received, benefits pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*. These benefits have been paid on behalf of Port Houston Marine, Inc. by U.S. Fire Insurance Company, its compensation insurance carrier.

III.

Movant would show that Section 5 of said Act, 33 U.S.C. § 905, provides the exclusive liability of employers subject to said Act is the benefits payable thereunder. Movant is an employer under said Act, the Plaintiff herein is an employee subject to said Act, and movant's exclusive liability for the alleged injuries of which the Plaintiff complains is the benefits payable under said Act.

IV.

Movant will rely in support of this motion upon the pleadings on file in this action, any affidavits filed herein, and upon all other evidentiary matters in the record in this case. Movant submits the attached Memorandum of Law in support of this motion.

WHEREFORE, PREMISES CONSIDERED, Third-Party Defendant prays that the Third Party Petition of Dockside Terminal Services, Inc. be dismissed at Third-Party Plaintiff's cost, and that movant have such other and further relief as may seem equitable and just.

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